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SUPREME COURT, U.S.

No. 80-1668

IN THE
SUPREME COURT FOR THE UNITED STATES
October Term, 1980

THE PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v.

WILBERT PEGUES,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERS

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
IN FORMA PAUPERIS TO ANSWER PETITION FOR WRIT OF CERTIORARI

RICHARD PAUL ZIPSER & ASSOCIATES, P.C.
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MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

NOW COMES WILBERT PEGUES, Respondent in the above entitled cause, by and through his attorney, RICHARD PAUL ZIPSER, and moves that this Honorable Court grant him leave to proceed in Forma Pauperis in order for him to answer the Petitioner's Petition for Writ of Certiorari, and in support of his motion states as follows:

1. That on or about the 10th day of November, 1977, Respondent, WILBERT PEGUES, was convicted by a jury of delivery of heroin in the Detroit Recorder's Court before the Honorable Justin Ravitz; the Respondent was sentenced by the Honorable Justin Ravitz on November 22, 1977.

2. That Respondent appealed his conviction to the Michigan Court of Appeals, said Court affirming the adjudication of guilt, however, ordered that the Respondent be resentenced before a judge other than the Honorable Justin Ravitz.

3. That the Michigan Court of Appeals denied a motion for rehearing made by the Petitioner.

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4. That upon appeal to the Michigan Supreme Court by the Petitioner, the Supreme Court affirmed the Michigan Court of Appeals.

5. That counsel for the Respondent throughout the appellate review in the Michigan judicial system has been RICHARD PAUL ZIPSER.

6. That the Respondent is financially unable to pre-pay fees, costs, or give security therefore, or pay any other costs as a result of his poverty, the Respondent having been in prison from November 10, 1977 to November 4, 1980 before release on bond. He is currently unemployed and is a student.

7. That prior to his imprisonment Respondent had never sought leave to proceed in Forma Pauperis in any other Court, and has not sought leave to proceed in Forma Pauperis to this date.

8. That the Respondent believes that he is entitled to redress, and requests that this Honorable Court allow him to proceed in answering the Petitioner's Petition for Writ of Certiorari in Forma Pauperis, and allow Richard Paul Zipser to represent him in the proceedings before this Honorable Court, in that said counsel has represented the Respondent throughout his appellate proceedings and is familar with the Respondent's cause.

WHEREFORE, Respondent prays that this Honorable Court allow him to proceed in this Court in Forma Pauperis by and through Richard Paul Zipser in order to answer the Petitioner's Petition for Writ of Certiorari.

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BY: RICHARD PAUL ZIPSER (P 22747)

and

BY: STEPHEN T. RABAUT (P 31143)
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IN FORMA PAUPERIS TO ANSWER PETITION FOR WRIT OF CERTIORARI

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

I. WILBERT PEGUES, being first duly sworn, depose and say as follows:

1. That I am the Respondent in the above entitled cause.

2. That in support of my Motion to Proceed in Forma Pauperis without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefore, or to pay any other necessary costs for said proceedings.

3. That I believe that I am entitled to redress in order to respond to the Petitioner's Petition for a Writ of Certiorari.

I further swear that the response which I have made to the questions and instructions below relating to my ability to pay costs of answering the Petition for Writ of Certiorari are true.

RICHARD PAUL ZIPSER & ASSOCIATES, P.C. • 25130 SOUTHFIELD ROAD, SUITE 102, SOUTHFIELD, MICH. 48075 • (313) 552-9520

1. Are you presently employed?

No; I was last employed by Rockwood Auto Parts in Rockwood, Michigan for one (1) month earning a salary of One Thousand ($1,000.00) Dollars per month.

2. Have you received within the past twelve (12) months any income from a business, profession or other form of self-employment, or in the form of rent payments, interests, dividends, or other source?

No.

3. Do you own any cash or checking or savings account?

Yes; two (2) checking accounts, the total balance of both accounts amount to Thirty ($30.00) Dollars.

4. Do you own real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes; 1975 Datsun; Value-Five Hundred ($500.00) Dollars.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Danelle Pegues, daughter, 11 years old.
Falisadoll Pegues, daughter, 9 years old.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Wilbert Pegues
WILBERT PEGUES

Subscribed and sworn to before me
this 20th day of May, 1981.

Dianne L. Boike
Dianne L. Boike, Notary Public
Wayne County acting in Oakland
State of Michigan

My Commission expires: 10-27-82

RICHARD PAUL ZIPSER & ASSOCIATES, P.C. • 25130 SOUTHFIELD ROAD, SUITE 102, SOUTHFIELD, MICH. 48075 • (313) 552-9520

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Respondent.

PROOF OF SERVICE

STATE OF MICHIGAN)
) ss.
COUNTY OF OAKLAND)

RICHARD PAUL ZIPSER, being first duly sworn, deposes and says that on the 22nd day of May, 1981, he served, Answer to Petition for Writ of Certiorari to the Court of Appeals of the State of Michigan, Motion for Leave to Proceed in Forma Pauperis, Affidavit in Support of Motion to Proceed in Forma Pauperis to Answer Petition for Writ of Certiorari, Appearance, and Proof of Service, upon:

Mr. Michael Rodak, Jr.
Clerk of the Court
United States Supreme Court
Washington, D.C. 20543

Anne B. Wetherholt (P 25635)
Assistanting Prosecuting
Attorney, Wayne County
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226

by then and there placing same in a sealed envelope and addressing said envelope as stated above with full postage prepaid and depositing said envelope in a United State Mail depository in the City of Lathrup Village, Michigan.

Richard Paul Zipser
RICHARD PAUL ZIPSER (P 22747)

Subscribed and sworn to before me
this 22nd day of May, 1981.

Dianne L. Boike
Dianne L. Boike, Notary Public
Wayne County (acting in Oakland)
State of Michigan

My Commission expires: 10-27-82

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ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

RICHARD PAUL ZIPSER & ASSOCIATES, P.C.
BY: RICHARD PAUL ZIPSER (P 22747) and
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COUNTER-QUESTION PRESENTED

WHETHER RESPONDENT, WILBERT PEGUES IS ENTITLED TO RESENTENCING BY A DIFFERENT JUDGE WHERE THE TRIAL COURT ACTIVELY USED ITS SENTENCING POWER TO ELICIT INFORMATION FROM THE RESPONDENT WHO EXERCISED HIS RIGHT TO REMAIN SILENT, AND MAINTAINED HIS INNOCENCE THROUGHOUT THE PROCEEDINGS?

PETITIONER:	NO
RESPONDENT:	YES
MICHIGAN SUPREME COURT AND MICHIGAN COURT OF APPEALS:	YES

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PARTIES TO THE PROCEEDING

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Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE
STATE OF MICHIGAN

NOW COMES WILBERT PEGUES, Respondent in the above entitled cause and prays that this Honorable Court deny the Petitioner's Petition for a Writ of Certiorari to review the judgment of the Court of Appeals of the State of Michigan entered in the above-entitled cause on April 25, 1980, application for rehearing denied by the Court of Appeals on July 9, 1980, and judgment of the Court of Appeals affirmed by the Michigan Supreme Court on February 13, 1981.

OPINIONS BELOW

The Michigan Court of Appeals by an opinion issued April 25, 1980 ruled it is a violation of the Fifth Amendment rights for a judge to actively use the sentencing power to elicit information from a defendant. The Court further held that it is improper to punish a defendant for exercising his right to remain silent. This

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would include a situtation where the defendant admits guilt, but refuses to disclose details of criminal activities. People v Anderson, 391 Mich 419; 216 NW2d 780 (1974); People v Westerfield, 71 Mich App 618, 644; 248 NW2d 641 (1977). This opinion is appended as Appendix A. An application for rehearing relying on Roberts v United States, 445 US 552, 100 S Ct 1358, 63 L Ed 2d 622 (1980), was denied by the Court of Appeals on July 9, 1980. This order is appended as Appendix B. The Court of Appeals opinion was affirmed by the Michigan Supreme Court in an order issued February 13, 1981. This order is appended as Appendix C.

COUNTER STATEMENT OF JURISDICTION

The opinion of the Michigan Court of Appeals was issued on April 25, 1980, wherein the decision of the Court was pursuant to the Fifth Amendment of the United States Constitution and the law of the State of Michigan cited by the Court, to wit: People v Anderson, 391 Mich 419; 216 NW2d 780 (1974); People v Westerfield, 71 Mich App 618, 644; 248 NW2d 641 (1977). Rehearing was denied July 9, 1980. The Court of Appeals opinion was affirmed by the Michigan Supreme Court in an order issued February 13, 1981. This Honorable Court is without jurisdiction pursuant to 28 USC § 1257(3) in that the decision of the Michigan Court of Appeals is based upon both the Fifth Amendment of the United States Constitution and laws of the State of Michigan. Fox Film Corp. v Muller, 296 US 207; 80 L Ed 158 (1935); Hale v Akers, 132 US 554; 33 L Ed 442 (1889).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

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> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COUNTER STATEMENT OF FACTS

Respondent, WILBERT PEGUES, was convicted along with co-defendants, VIVIAN CLARK and MICHELLE HOOKS, after trial by jury before the Honorable Justin C. Ravitz, of the Recorder's Court for the City of Detroit, of delivery of heroin. (Trial transcript volume III, 168).

Prior to trial in the present case, Respondent's counsel presented a motion to disqualify the trial judge on grounds of prejudice toward Respondent. The trial judge stated at that hearing that he would impose the maximum sentence on Respondent if Respondent was convicted, and if Respondent did not offer information about narcotic activities (motion transciprt 2-5). The trial court went on to deny the Motion to Disqualify. (MT 5).

Throughout the proceedings against him, Respondent maintained his innocence of the crime charged. Respondent presented

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testimony indicating his lack of intent to deliver heroin. However, at sentencing, the trial court imposed the maximum sentence (13 years 4 months to 20 years) upon Respondent and further recommended to the Department of Corrections for the State of Michigan that Respondent be kept in prison for the full twenty (20) years unless he gave information as to his involvement in narcotics trafficking. (Sentencing transcript 7-8).

The Petitioner has petitioned this Honorable Court for a Writ of Certiorari, setting forth the grounds for said petition in their brief. Though the Michigan Court of Appeals has ordered on two previous occassions, and the Michigan Supreme Court has also previously ordered that the instant matter be remanded to the trial court for resentencing before a different judge, to this date the Respondent has not been resentenced.

REASONS FOR DENYING WRIT OF CERTIORARI

Respondent is entitled to be resentenced by a judge other than the trial judge in that the trial judge actively used his sentencing power to elicit information from the Respondent who exercised his right to remain silent, and maintain his innocence throughout the proceedings. This decision has been made by the Michigan Court of Appeals pursuant to the Fifth Amendment of the United States Constitution and pursuant to the Constitution and laws of the State of Michigan. This Honorable Court must deny the Petitioner's Petition for a Writ of Certiorari.

In its brief, the Petitioner contends that the Michigan Court of Appeals was clearly erroneous in it interpretation of the Fifth Amendment of the United States Constitution. The Petitioner contends that the Respondent is not entitled to be resentenced before a judge other than the trial judge. It appears that the real

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issue involved in the present matter is the balance between the resentencing of the Respondent before an impartial judge, the impingement of the Respondent's right to remain silent, pursuant to the Fifth Amendment of the United States Constitution and Article I, § 17 of the Michigan Constitution (1963), and Respondent's right to maintain his innocence in accordance with the Constitution and laws of the State of Michigan. The Respondent merely seeks to be resentenced before an impartial judge. His criminal record prior to this proceeding has no conviction for a serious offense, however, the Respondent received the maximum sentence in the instant matter before a judge who was bias against him from before the first day of trial. What, if anything, will the Petitioner achieve by its petition for a Writ of Certiorari? It merely seeks to uphold the maximum sentence of this Respondent by a bias judge and is not concerned with the constitutional rights of the criminally accused, concepts of fairness and due process and the rights of the criminally accused at the time of sentencing pursuant to Michigan law. The Respondent, WILBERT PEGUES, maintained his innocence of the crime of which he was convicted, to wit: delivery of heroin, throughout the proceedings against him. Respondent, PEGUES, presented testimony indicating his lack of intent to deliver heroin. However, the trial judge stated at a hearing prior to trial that he would impose the maximum sentence on Respondent if the Respondent was convicted, and if he did not offer information about narcotics activities. As a result of this action taken by the trial judge, the Michigan Court of Appeals found that Respondent was entitled to sentencing before a different judge. The Court stated:

> It is a violation of Fifth Amendment rights for a judge to actively use sentencing power to elicit information from a Defendant. It is improper to punish a Defendant for exercising his right to remain silent. This would include a situation where the Defendant admits

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> guilt, but refused to disclose details of criminal activities. People v Anderson, 391 Mich 419; 216 NW2d 780 (1974); People v Westerfield, 71 Mich App 618, 644; 284 NW2d 641 (1977).

It is interesting to note that at page six (6) of the Petitioner's brief, where the Petitioner quoted the Michigan Court of Appeals, that the Petitioner neglected to add the last sentence of the Michigan Court of Appeals. As is quoted above, that sentence is, "This would include a situation where the Defendant admits guilt, but refuses to disclose details of criminal activities . People v Anderson, 391 Mich 419; 216 NW2d 780 (1974); People v Westerfield, 71 Mich App 618, 644; 284 NW2d 641 (1977)". Pursuant to the case law cited by the Michigan Court of Appeals in its opinion, it is a violation of due process of law, at least pursuant to the Michigan Constitution (Article I, § 17), for a sentencing judge to increase the sentence imposed for the reason that the Defendant refused to admit his guilt of the offense for which he has been convicted. In Westerfield, supra, the Michigan Court of Appeals cites People v Grable, 57 Mich App 184; 225 NW2d 724 (1974), wherein a Defendant maintained his innocence throughout the trial and continued to do so after conviction, holding that the Defendant had a right to do so without penalty. The court continued by explaining that Grable clearly indicates that it was improper for the Court to compel this admission by threatening the Defendant with the higher sentence. The Court stated that a sentence based on such considerations, amounts to a denial of due process.

The foundation of the Petitioner's Petition is the recent United States Supreme Court decision of Roberts v United States, 445 Us 552; 100 S Ct 1358; 63 L Ed 2d 622 (1980). The issue in that case as was stated by Mr. Justice Powell in the opinion of the Court was "Whether the District Court properly considered, as one factor in imposing sentence, the Petitioner's refusal to cooperate

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with officials investigating a criminal conspiracy in which he was a confessed participant". (emphasis added). The Petitioner in that case admitted that he had delivered heroin on several occassions. He also confessed that he had discussed drug transactions in certain intercepted phone conversations, and explained the meaning of code words used in the conversations. Subsequently, Petitioner was indicted on one (1) count of conspiring to distribute heroin, and four (4) counts of using a telephone to facilitate the distribution of heroin. In Roberts, supra, Petitioner retained a lawyer, who rejected the Government's continued efforts to enlist the Petitioner's assistance. The Petitioner plead guilty to two (2) counts of telephone misuse. Petitioner was sentenced to consecutive sentences of one to four years on each count. The Court explained that these sentences were appropriate because Petitioner was on parole from a bank robbery conviction at the time of the offenses, and because he was an admitted dealer who had refused to cooperate with the Government.

In affirming the sentence imposed by the Court and allowing the District Court to look at the Petitioner's refusal to cooperate, the Supreme Court made it clear that if there was "Misinformation of a constitutional magnitude" there could be due process objections to the sentence imposed. (citing United States v Tucker, 404 US 443 (1972); Townsend v Burke, 344 US 736 (1948). The Court continued stating at 100 S Ct 1362:

> No such misinformation was present in this case. The sentencing court relied upon essentially undisputed facts. There is no question that Petitioner rebuffed repeated requests for his cooperation over a period of three years. Nor does Petitioner contend that he was unable to provide the requested assistance. (emphasis added).

In the present case before this Court, the trial court relied upon the misformation that Respondent was a dealer in heroin. He accused Respondent of such dealings even prior to trial. Throughout the

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trial Respondent maintained his innocence to such dealings. There is no question that the trial court relied upon disputed facts. Furthermore, Respondent made it clear that he was unable to provide the requested assistance and that he was totally unfamilar with such activities.

In its brief in support of its Petition for a Writ of Certiorari, the Petitioner cites Bordenkircher v Hayes, 434 US 357; 98 S Ct 663; 54 L Ed 2d 604 (1978) and Corbitt v New Jersey, 439 US 212; 99 S Ct 492; 58 L Ed 2d 466 (1978), for the proposition that the Courts have distinguished between the impermissible punishment of a person for honestly exercising his constitutional rights and the permissible refusal to extend leniency to a person who has not demonstrated behavior justifying leniency. This proposition asserted by the Petitioner is not in issue in this case before this Honorable Court. The issue before this Court is not one of extending leniency, but rather the right of the criminally accused to remain silent at the time of sentencing and to maintain his innocence even after conviction without punitive result. In its brief, the Petitioner further cites United States v Grayson, 438 US 41, 98 S Ct 2610, 57 L Ed 2d 582, in which this Court held that in sentencing a criminal defendant a trial court could take into account the false testimony of the Defendant by punishing the Defendant for the crime of perjury though he had not been indicted,tried, or convicted, and that such action by a trial court was not a violation of due process of law. In Grayson, supra, this Court further held that such action by the trial court did not impermissibly chill the Defendant's constitutional right to testify. Again, the issue before this Court is not one of enhanced punishment as a result of perjury, or the impermissible chill of the constitutional right to testify, but rather the right of the criminally accused to remain silent and to maintain his

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innocence even after conviction without a punitive result. In its brief, the Petitioner has failed to cite any authority which would merit the reversal of the decisions of the Michigan Supreme Court and the Michigan Court of Appeals. It is unequivocal that the decision and opinion by the Michigan Court of Appeals is pursuant to both the Fifth Amendment of the United States Constitution and the Constitution and laws of the State of Michigan. It was Respondent's assertion of his right to remain silent pursuant to the Fifth Amendment of the United States Constitution, and Article I, § 17 of the Michigan Constitution which triggered the vindictiveness of the trial court. Whenever flexibility and individualization has given way to prosecutorial or judicial vindictiveness against those who assert their rights, this Court has condemned the practice. North Carolina v Pearce, 395 US 711; 89 S Ct 2072; 23 L Ed 2d 656 (1968).

Pursuant to the law of the State of Michigan it is improper for a Court to impose a larger sentence upon a convicted defendant because of the defendant's refusal to admit guilt of the offense of which he has been convicted. People v Grable, 57 Mich App 184; 225 NW2d 724 (1974). In Grable, supra, the defendant, as in the present case, maintained his innocence throughout the trial and continued to do so after conviction. In that case it was held by the Michigan Court of Appeals that a Defendant had a right to maintain his innocence after conviction without incurring an additional penalty by imposition of a larger sentence. Respondent contends that the trial court's threats and eventual imposition of the maximum sentence upon him because he would not give information regarding narcotics transactions to the Court was error pursuant to Grable, supra, and People v Westerfield, 71 Mich App 618;

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248 NW2d 641 (1977). In effect the trial court is asking the Respondent both to admit his guilt, and to give information about narcotics activity, and was punishing him for doing neither by imposing the maximum sentence upon Respondent for his crime, all in light of the fact that Respondent had maintained his innocence. Such was not the case in Roberts v United States, supra, which the Petitioner cites in support of its position, wherein the Defendant in that case had made earlier admissions of guilt, revealing his ability to assist law enforcement officers.

The request at sentencing by the trial court for Respondent to give information regarding narcotics activities was in effect a request by the Court for Respondent to perjure himself after respondent had presented a defense at trial of absence of intent to deliver narcotics. Such action by the trial court was in violation of Respondent's constitutional Fifth Amendment right to remain silent and the right to remain silent and due process rights pursuant to Article I, § 17 of the Constitution of the State of Michigan; and further was error pursuant to Grable, supra and Westerfield, supra.

The State Courts may impose greater restrictions than the Federal Constitutional law as interpreted by the Supreme Court if they so desire, based upon the State's Constitution. Oregon v Hass, 420 US 741; 95 S Ct 1215 (1975). The Supreme Court of Michigan has at times given greater protection to individual rights than the Federal Courts. In Michigan, the Supreme Court has been committed to the doctrine since long before Miranda v Arizona, 384 US 436 (1966), that even in the face of specific accusation of a crime that an accused's silence may not be used against him. People v Bobo, 390 Mich 355; 212 NW2d 190 (1973). In People v Bigge, 288 Mich 417; 285 NW2d 5 (1939), the Supreme Court stated:

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> The time has not yet come when an accused must cock his ear to hear every damaging allegation against him and, if not denied by him, have the statement and his silence accepted as evidence of guilt. There can be no such thing as confession of guilt by silence in or out of court. The unanswered allegation by another of the guilt of a Defendant is not confession of guilt on the part of Defendant. Defendant, if he heard the statement, was not morally or legally called upon to make denial or suffer his failure to do so to stand as evidence of his guilt.

Similarly, it is clear from Bobo, supra, and Bigge, supra, that the Respondent was not required to assert his right to remain silent expressly when accused of having knowledge of narcotics dealings, except by remaining silent. Under the law of the State of Michigan, remaining silent, in and of itself, was an assertion of Respondent's Constitutional right of remaining silent. Bobo, supra, Mich. Const. 1963, Article I, § 17.

Thus, Respondent contends that by imposing the maximum sentence on him, because he would not admit guilt, and give information about narcotics activity, the trial court violated Respondent's due process rights and his right to remain silent. Mich. Const. 1963 Article I, § 17. Respondent was in effect punished for not giving evidence to the Court which would incriminate him, and the Court indicated that indeed the maximum sentence would be and was being imposed because Respondent had not cooperated with the Court in incriminating himself and others by giving information regarding involvement in narcotics transactions. Respondent contends that the trial judge's blunt assertion that he would impose the maximum sentence upon Respondent for exercising his right to remain silent and the subsequent imposition of the maximum sentence, is a patent violation of Respondent's due process rights and his right to remain silent, pursuant to the Michigan Constitution 1963, Article I, § 17.

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CONCLUSION

For the foregoing reasons it is respectfully requested that this Honorable Court deny the Petitioner's Petition for Writ of Certiorari, the decision of the Michigan Supreme Court and Michigan Court of Appeals being in accordance with the laws of the State of Michigan and the laws of the United States of which the decisions of both Courts are based. In the alternative Respondent prays that this cause be remanded to the appropriate State Appellate Court for clarification as to the foundation of the Court's decision in order to determine whether its decision is founded solely on the Fifth Amendment of the United States Constitution or pursuant to both the Federal Constitution and the Constitution and the laws of the State of Michigan.

Respectfully submitted,

RICHARD PAUL ZIPSER & ASSOCIATES, P.C.

BY: RICHARD PAUL ZIPSER (P 22747)

and

BY: STEPHEN T. RABAUT (P 31143)
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DATED: May 20, 1981

RICHARD PAUL ZIPSER & ASSOCIATES, P.C. • 25130 SOUTHFIELD ROAD, SUITE 102, SOUTHFIELD, MICH. 48075 • (313) 552-9520

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

APR 25 1980

v

No. 78-279

WILBERT PEQUES,

Defendant-Appellant.

BEFORE: D.E. Holbrook, Jr., P.J., and R.M. Maher and Cynar, JJ.

PER CURIAM

On November 10, 1977, defendant was convicted by a jury of delivery of heroin contrary to MCL 335.341; MSA 18.1070(41). Thereafter sentenced to 13 to 20 years imprisonment, he appeals by leave.

Judge Ravitz indicated in an in-camera discussion with the attorneys that the defendant could anticipate the maximum sentence if convicted unless intelligence information was offered about other drug transactions. Defendant made a motion to disqualify Judge Ravitz and the judge denied it. The question was brought before another judge in the Recorder's Court and it was again denied. We find no error in the denial of the defense motion to disqualify. The record must show actual bias or prejudice before a conviction will be reversed on the ground that the trial judge should have disqualified himself. People v Elmore, 92 Mich App 678; ___ NW2d ___ (1979), People v Lobsinger, 64 Mich App 284; 235 NW2d 761 (1975). However, we do find that defendant is entitled to resentencing by a different judge. While there is a natural inclination to reward co-operation, there must be a reluctance to coerce it. It is a violation of Fifth Amendment rights for a judge to actively use the sentencing power to elicit information

from a defendant. It is improper to punish a defendant for exercising his right to remain silent. This would include a situation where the defendant admits guilt, but refuses to disclose details of criminal activities. People v Anderson, 391 Mich 419; 216 NW2d 780 (1974), People v Westerfield, 71 Mich App 618, 644; 248 NW2d 641 (1977).

As to defendant's remaining allegations of error, we find them to be without merit.

Affirmed. Remanded for resentencing before a different judge. We do not retain further jurisdiction.

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 3rd day of July in the year of our Lord one thousand nine hundred and eighty

Present the Honorable

Donald E. Holbrook, Jr.

Presiding Judge

Richard M. Maher
Walter P. Cynar

Judges

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILBERT PEQUES,

Defendant-Appellant.

AMENDED ORDER

No. 78-279

In this cause an application for rehearing is filed by plaintiff-appellee, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application for rehearing be, and the same is hereby DENIED for lack of merit in the grounds presented.

STATE OF MICHIGAN--ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 9th day of July in the year of our Lord one thousand nine hundred and eighty

Ronald L. Dzierbicki
Clerk

CA3C180

February 13, in the year of our Lord one thousand nine hundred and eighty one.

Present the Honorable

MARY S. COLEMAN,
Chief Justice.

THOMAS GILES KAVANAGH,
G. MENNEN WILLIAMS,
CHARLES L. LEVIN,
JOHN W. FITZGERALD,
JAMES L. RYAN,
BLAIR MOODY, JR.,
Associate Justices

CR 31-41 & a & b

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

WILBERT PEQUES,

Defendant-Appellee.

SC: 65655
COA: 78-279
LC: 77-05507

On order of the Court, the motion for immediate consideration is GRANTED.

The delayed application for leave to appeal is considered, and, pursuant to GCR 1963, 853.2(4), in lieu of leave to appeal, we AFFIRM the judgment of the Court of Appeals, and we direct that the Court of Appeals opinion in this case be published.

The stay of resentencing previously ordered by this Court is DISSOLVED.

Williams and Moody, Jr., JJ., dissent, in part, and state as follows:

We would set aside that part of the judgment of the Court of Appeals which found that the defendant was entitled to resentencing by a different judge.

In making a sentence determination, it is within the discretion of the trial judge to consider as an aspect of remorse whether a defendant has or has not cooperated with law enforcement authorities. However, the recommendation of the trial judge to the Department of Corrections proposing future punishment if the defendant remains uncooperative is coercive and improper.

STATE OF MICHIGAN — ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 13th day of February in the year of our Lord one thousand nine hundred and eighty one.

Robin R Davis Deputy Clerk.

THE COURT: FILE NUMBER 77-05507, STATE VS. WILBERT PEQUES, MICHELE HOOKS AND VIVIAN CLARK; THE DEFENDANTS HERE ALL CONVICTED BY A JURY ON NOVEMBER 10TH OF DELIVERY OF HEROIN. THEY ARE HERE TODAY FOR PURPOSES OF SENTENCING.

THE RECORD SHOULD REFLECT THAT I'VE REVIEWED THE PRE-SENTENCE REPORT AND RECOMMENDATIONS SUBMITTED AS TO ALL THREE OF YOU AND IN ADDITION I'VE RECEIVED THREE LETTERS THAT I READ WITH RESPECT TO MR. PEQUES ONE OF WHICH WAS WRITTEN BY HIMSELF.

BEFORE I IMPOSE SENTENCE, IS THERE ANYTHING YOU, MR. ISAACSON, OR THE DEFENDANTS OR ANYBODY ELSE WISHES TO SAY ON THEIR BEHALF, YOU'RE WELCOME TO SPEAK.

MR. ISAACSON: YES, YOUR HONOR, I'D LIKE TO MAKE A FEW COMMENTS IF THE COURT PLEASE, HOWEVER, I'D LIKE TO DEFER TO MR. PEQUES' REVEREND WHO IS HERE. REVEREND ABRAHAMS WOULD LIKE TO ADDRESS THE COURT.

REV. ABRAHAMS: YOUR HONOR, I'D LIKE TO THANK YOU FOR THIS PRIVILEGE OF HAVING THE OPPORTUNITY TO SAY JUST A WORD ON THE BEHALF OF MR. PEQUES WHO HAS BEEN A MEMBER OF OUR CHURCH FOR SOME TIME.

I'D LIKE TO SAY THAT HE HAVE DISPLAYED A TYPE OF CHARACTER THAT WE BELIEVE IS OUTSTANDING IN THE COMMUNITY AND HE HAVE LIVED IN SUCH A MANNER THAT WE HAVE NOT SEEN ANYTHING OF HIM, ABOUT HIS CHARACTER, THAT WOULD INDICATE

THAT HE WAS NOT ANYTHING EXCEPT A LAW-ABIDING CITIZEN. SO WE'RE DEEPLY MOVED BY THIS THING THAT HAS HAPPENED. WE ARE HOPING THAT IN THE INTEREST OF MERCY THAT WE MIGHT MAKE SOME KIND OF A PLEA ON HIS BEHALF, YOUR HONOR. THAT IF THERE'S A STIPULATION WITHIN THE FRAMEWORK OF MERCY THAT YOU'D EXTEND TO HIM, - SOME LENIENCY, WE WOULD LIKE TO ASK YOU TO CONSIDER THIS AT THIS TIME. HE HAS BEEN A BEAUTIFUL PERSON IN OUR PRESENCE; HE HAVE BEEN A GOOD MEMBER OF THE CHURCH. WE WOULD LIKE TO ASK THIS AT THIS TIME.

THE COURT: REVEREND, THANK YOU. I APPRECIATE YOUR PRESENCE AND I APPRECIATE YOUR REMARKS.

FRANKLY, I'M TEMPTED TO INQUIRE AS TO THE CHURCH'S ATTITUDE ABOUT ONE WHO WOULD DISPENSE $30,000.00 WORTH OF HEROIN IN OUR COMMUNITY; BUT THAT MIGHT BE A BIT UNFAIR TO ASK THAT OF YOU AT THIS POINT SO I'LL REFRAIN FROM ASKING.

MR. ISAACSON, IS THERE ANYTHING THAT YOU OR OTHERS WISH TO SAY?

MR. ISAACSON: I'D LIKE TO ADDRESS THE COURT JUST BRIEFLY IN RELATIONSHIP TO THE DEFENDANTS.

I HAVE HAD A CHANCE TO READ THE PRE-SENTENCE REPORTS; I HAVE NO ADDITIONS OR CORRECTIONS TO MAKE. I WOULD JUST -- WELL, I HESITATE TO GET INTO A LONG DISSERTATION TO THE COURT BECASE THE COURT HAS INDICATED TO US ITS FEELINGS REGARDING THIS CASE FROM THE OUTSET. HOWEVER, I WOULD JUST INDICATE THAT MR. PEQUES HAS NO PREVIOUS FELONY RECORD; HE

IS MARRIED; HE HAS A GOOD EMPLOYMENT RECORD; HE HAS A -- FOUR YEARS IN THE AIR FORCE; HE HAS AN HONORABLE DISCHARGE AND A GOOD CONDUCT MEDAL AND I'D ASK THE COURT TO TAKE THOSE THINGS INTO CONSIDERATION IN IMPOSING SENTENCE UPON MR. PEQUES.

IN RELATION TO MISS CLARK, YOUR HONOR, SHE HAD NO RECORD AT ALL. SHE HAD A VERY GOOD JOB; SHE'S A DATA PROCESSOR, COMPUTER KEY PUNCH OPERATOR AND SHE'S A HIGH SCHOOL GRADUATE AND HAS HAD TRAINING THEREAFTER. I'D ASK THE COURT TO TAKE THOSE THINGS INTO CONSIDERATION IN RELATION TO MISS CLARK'S SENTENCING.

IN RELATION TO MRS. HOOKS, YOUR HONOR, I DO UNDERSTAND AND KNOW THAT YOU HAVE SENTENCED HER OR ARE ABOUT TO ON SOME OTHER MATTERS THAT THERE ARE REPORTS QUITE IN DEPTH REGARDING HER AND I THINK THEY WILL SPEAK FOR THEMSELVES.

THE COURT: THANK YOU.

ANYTHING YOU WISH TO SAY, MR. PEQUES?

DEFENDANT PEQUES: YES, SIR.

I WOULD LIKE TO SAY THAT I THINK THAT THIS THING HAS REALLY BEEN BLOWN TOTALLY OUT OF PROPORTION AND I'D LIKE TO THANK THE REVEREND AND ALL MY OTHER FRIENDS WHO ARE HERE, WHO CAME DOWN. AND THERE'S QUITE A BIT THAT I WOULD LIKE TO SAY BUT I'M NOT FREE -- AM I FREE TO SPEAK?

THE COURT: CERTAINLY.

DEFENDANT PEOPLES: OKAY. THERE'S A LITTLE NOTE, A LETTER THAT I COMPILED YESTERDAY AND IT REALLY REFLECTS MY FEELINGS AND ATTITUDE OF THIS COURT, THAT HAS ADOPTED TOWARD ME. IT GOES LIKE THIS: I KNEW FROM THE START YOU HAD CONVICTED ME IN YOUR HEART. YOU SAY COOPERATE WITH ME; I'LL SET YOU FREE. WHAT MANNER OF MAN DO YOU CHOOSE TO MAKE ME? OVER AND OVER AGAIN AND AGAIN, INFORM, INFORM. WHAT ABOUT YOUR PAID SERVANTS THAT ARE IN UNIFORM? IT IS I WHO HAS THE MOST TO LOSE FROM YOUR FORCE OF 5000 FROM WHICH YOU CHOOSE. WHERE IS YOUR LOGIC? IF A MAN IS BUSTED WHY WOULD HE BE TRUSTED? HIS FREEDOM FOR ANOTHER; HE'LL HAVE ME, NOT ANOTHER BROTHER. WHERE'S YOUR LOGIC? WHY TAKE A FELON WORD; BUST ANYONE OR TELL US WHAT YOU HAVE HEARD. YOU HELD THE COPS FOR A JOB WELL DONE, YET YOU INSIST I RESIST. YOU PUT ME UNDER THE GUN. 30,000 IN DOPE YOU SAY YOU BUY; ZERO TO 4.6, - JUST A VERY BAD TRY. 95.4 I'D LIKE TO KNOW THERE -- THIS IS NOTHING BUT A VERY SAD SHOW. WHERE'S ALL THE LOGIC MENT? WHAT WOULD BE THE CHARGE IF IT WAS 100 PERCENT? WHO'S FOOLIN' WHO? YOU'RE NOT FOOLIN' ME; YOU ONLY WANT SOMEONE TO SCREW. WHAT WILL BE YOUR NEXT MOVE SINCE SNITCHIN' I DID NOT CHOOSE. IS THERE ANY MORE THAT YOU WANT ME TO LOSE? MAYBE STAND MUTE AND BE YOUR FOOL? WITH A CONVICTION YOU'RE NOT SATISFIED, YOU STILL SAY BUST, RUN AND HIDE. I TAKE WHAT I GOT COMING, NOTHING COULD BE WORSE AS RUNNING. WITH A CONVICTION YOU TAKE MY BOND, NOT BECAUSE YOU THINK I MAY RUN,

ONLY TO PUT ON THE HEAT. APPEAL, APPEAL, THIS WILL BE THE LAST TRY, WHICH IS YOUR OPTION TO DENY. PROBATION, SUSPENDED SENTENCE, FINE, I DESERVE ANY OF THE THREE. I STRONGLY URGE, WE DESERVE A BREAK TODAY, THOUGH WE'VE BEEN CONVICTED OF GOING ASTRAY. BREAKER, BREAKER, WHICH CHANNEL DO I DIAL; WE DID NOT RECEIVE A VERY FAIR TRIAL.

AND THOSE ARE MY SINCERE OPINIONS OF WHAT HAS HAPPENED.

THE COURT: THANK YOU.

ANYTHING YOU WISH TO SAY, MISS HOOKS?

DEFENDANT HOOKS: No.

THE COURT: MISS CLARK?

DEFENDANT CLARK: No.

THE COURT: MR. PEQUES, WE COULD PROBABLY CARRY ON AN INTERESTING DIALOGUE.

DEFENDANT PEQUES: I BELIEVE WE COULD.

THE COURT: MINE WOULDN'T BE IN THE FORM OF POETRY BECAUSE POETRY IS A FORM OF ART AND ART SHOULD BE RESERVED TO GIVE EXPRESSION TO THINGS THAT ARE MEANINGFUL AND TO THINGS THAT ARE TRUE AND TO THINGS THAT REFLECT REALITY FOR REAL HUMAN BEINGS OUT HERE.

YOU CAN POSTURE ALL YOU WANT AS A VICTIM; YOU CAN EVEN PERHAPS PUBLISH POETRY FROM PRISON; WE CAN CALL IT LETTERS FROM PRISON BY MR. PEQUES BUT YOU'RE NOT A VICTIM YOU'RE A VICTIMIZER. YOU'RE THE SORT OF PERSON WHO WASN'T

OUT HERE SUFFERING AS AN ADDICT WHO NEEDED HEROIN AND WHO MIGHT HAVE OCCASIONALLY DEALT IN HEROIN IN ORDER TO SUPPORT YOUR HABIT. YOU RATHER I'M SATISFIED FROM ALL THE EVIDENCE ARE THE PERSON WHO DIDN'T CARE ABOUT THE SMALL PEOPLE STRUNG OUT HERE BUT RATHER WHO CARED ABOUT ENHANCING YOUR OWN FORTUNE.

DEFENDANT PEGUES: SIR, I --

THE COURT: I DON'T HAVE ANY RESPECT FOR YOUR POETRY; I DON'T HAVE ANY RESPECT FOR YOUR POSITION AND I DON'T REGARD YOU AS A VICTIM; I REGARD YOU AS QUITE THE OPPOSITE. I NEVER PROMISED YOU FREEDOM FOR SNITCHING. I DID SAY TO YOU STRAIGHT UP THAT IF YOU WANTED CREDIT FOR GIVING RELIABLE, INTELLIGENT INFORMATION ON PEOPLE ABOVE YOU UP THE LADDER, THAT YOU WOULD GET CREDIT FOR THAT. AND I DON'T APOLOGIZE FOR THAT POSITION AT ALL BECAUSE I HAPPEN TO TIRE OF SEEING THE DOWN AND OUT, POOR VICTIM ADDICTS HERDED THROUGH THE COURT WHILE THE RICH, FAT CATS INVARIABLY GO FREE. SO I'LL USE MY OFFICE TO DO WHAT I CAN WITHOUT APOLOGIZING EVER TO GET HIGHER UP THE LADDER.

IT'S THE SENTENCE OF THIS COURT, MR. PEGUES, THAT YOU BE CONFINED TO THE CUSTODY OF THE MICHIGAN DEPARTMENT OF CORRECTIONS, SIR, FOR A PERIOD OF NOT LESS THAN 13 YEARS AND 4 MONTHS AND FOR A PERIOD NOT TO EXCEED 20 YEARS. THE MAXIMUM SET BY STATUTE. MY RECOMMENDATIONS TO THE DEPARTMENT OF CORRECTIONS ARE THAT THEY HOLD YOU FOR THE MAXIMUM TERM UNLESS YOU GIVE THEM, SOON AFTER YOUR ARRIVAL, MEANINGFUL

INTELLIGENCE INFORMATION ON WHO THE HIGHER UPS ARE AND IF YOU DON'T I HOPE THEY KEEP YOU FOR 20 YEARS. AND IF YOU GET OUT EARLIER THEN PEOPLE MIGHT THINK YOU DID SNITCH AND THAT'S AN INTERESTING WORD. YOU SOMEHOW OR ANOTHER THINK THAT IT'S WRONG, - THINK THAT IT'S DIRTY TO SNITCH. I CAN RESPECT THAT TO A CERTAIN EXTENT. THERE ARE PEOPLE WHO ONE SHOULDN'T SNITCH ON BUT THE DOPE MAN ISN'T SUCH A PERSON. IT CAN BE HEROIC TO TELL WHO POISONS ALL OF OUR YOUNG PEOPLE. YOU GET 13 DAYS CREDIT FOR TIME ALREADY SERVED.

MISS HOOKS, IT'S THE SENTENCE OF THIS COURT THAT YOU BE CONFINED TO THE CUSTODY OF THE MICHIGAN DEPARTMENT OF CORRECTIONS FOR A PERIOD OF NOT LESS THAN 10 YEARS AND FOR A PERIOD NOT TO EXCEED 20 YEARS. YOU GET 119 DAYS CREDIT FOR TIME ALREADY SERVED.

MISS CLARK, IT'S THE SENTENCE OF THIS COURT THAT YOU BE CONFINED TO THE CUSTODY OF THE MICHIGAN DEPARTMENT OF CORRECTIONS FOR A PERIOD OF NOT LESS THAN 9 YEARS AND FOR A PERIOD NOT TO EXCEED 20 YEARS. YOU GET CREDIT FOR 13 DAYS ALREADY SERVED.

I MAKE NO SPECIAL RECOMMENDATIONS TO THE DEPARTMENT WITH RESPECT TO EITHER OF YOU.

IT'S MY RESPONSIBILITY TO TELL THE THREE OF YOU THAT YOU ALL HAVE A RIGHT TO APPEAL YOUR CONVICTIONS AND YOUR SENTENCES IF YOU WISH. IF YOU WANT TO APPEAL AND YOU CANNOT AFFORD A LAWYER TO DO SO I'LL APPOINT ONE FOR YOU FOR

FOR FREE, SO LONG AS YOU RETURN THE APPEAL PAPERS TO ME WITHIN 60 DAYS.

THANK YOU.

MR. ISAACSON: IF THE COURT PLEASE, I WOULD LIKE TO MAKE A MOTION AT THIS TIME TO REINSTATE THE BOND SO THAT THE DEFENDANTS, ESPECIALLY MISS CLARK AND MR. PEGUES, - IN ESSENCE APPEAL BONDS, - WHILE WE APPEAL THIS MATTER. I THINK THERE ARE SIGNIFICANT ISSUES THAT HAVE BEEN RAISED BY THE MOTIONS AND THE PROCEEDINGS HEREIN AND I THINK THAT MR. PEGUES HAS SHOWN GOOD FAITH IN APPEARING IN COURT WHENEVER DIRECTED. AND I REQUES THE COURT TO ALLOW HIM TO REMAIN AT LARGE ON THAT BOND WHILE THE CASE IS BEING APPEALED.

THE COURT: MOTION FOR BOND PENDING APPEAL IS DENIED.

(HEARING CONCLUDED)

# # #